

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1228

Filed: 15 August 2017

Forsyth County, No. 13 CRS 61500

STATE OF NORTH CAROLINA

v.

DONALD WEBB

Appeal by defendant from judgment entered 18 March 2016 by Judge Michael D. Duncan in Forsyth County Superior Court. Heard in the Court of Appeals 31 July 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Tenisha S. Jacobs, for the State.*

*North Carolina Prisoner Legal Services, Inc., by Lindsay Bass, for defendant-appellant.*

CALABRIA, Judge.

Donald Webb (“defendant”) appeals from the judgment entered upon his conviction for obtaining property by false pretenses. Defendant argues that he received ineffective assistance of trial counsel. Because we conclude defendant has failed to show that he received ineffective assistance of counsel, we find no error.

I. Factual and Procedural Background

On 8 September 2014, defendant was indicted on charges of obtaining property by false pretenses, breaking or entering, and larceny after breaking or entering. The basis for the indictment were allegations that defendant had broken into and entered an apartment at Greenway Apartments in Winston-Salem, North Carolina. After entering the apartment, defendant removed a stove, washer, and dryer valued at \$900. Defendant then presented the appliances to Omni Source, Inc., represented that the property belonged to him, and sold the appliances as scrap metal.

A jury returned a verdict finding defendant guilty of obtaining property by false pretenses. The trial court sentenced defendant to a term of 6 to 17 months' imprisonment in the custody of the North Carolina Department of Adult Correction. The trial court then suspended defendant's sentence, and placed him on supervised probation for 24 months. Defendant entered notice of appeal in open court.

II. Ineffective Assistance of Counsel

Defendant's sole argument on appeal is that his trial counsel was ineffective by failing to request a curative instruction after the trial court sustained his objection to a statement made by the prosecutor during closing arguments. We disagree.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two prong test.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made

STATE V. WEBB

*Opinion of the Court*

errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

*State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

Here, during closing arguments, the prosecutor stated to the jury:

[Defense counsel] told you that this is a felony and that the charge does carry significant time. It is a serious case. It is a serious case to the defendant. It is also a serious case to the State. What [defense counsel] didn’t tell you is that punishment also could just be probation, that’s it, and that’s up to the Judge.

Defendant’s attorney objected to the prosecutor’s statement. After a short bench conference, the trial court sustained the objection and instructed the jury to “disregard” the prosecutor’s statement.

Defendant claims that his trial counsel was ineffective because he failed to request a curative instruction and failed to move for a mistrial. Defendant contends that the trial court’s instruction to disregard the prosecutor’s statement was insufficient to cure the harm caused by the statement. We disagree.

Our Supreme Court has stated: “ ‘Where, immediately upon a defendant’s objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, *the impropriety is*

STATE V. WEBB

*Opinion of the Court*

*cured.’ ” State v. Small, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (emphasis added) (quoting State v. Woods, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982)); see also State v. Herring, 322 N.C. 733, 745, 370 S.E.2d 363, 371 (1988) (holding that trial court’s prompt action in instructing jury to disregard eight statements during closing argument “removed any possibility of reversible error”).*

Consequently, because the trial court’s instruction sufficiently remedied any impropriety in the prosecutor’s statement, we conclude that counsel’s purported failure to request a curative instruction or move for a mistrial did not constitute deficient performance. Accordingly, defendant’s ineffective assistance of counsel claim is without merit.

NO ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).